IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17701 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJESH TEXTILE INDUSTRIES

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 17701 of 2003

MR BB NAIK for Petitioner No. 1

MR DN PATEL for Respondent No. 1, 2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 20/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Mr DN Patel, learned Senior Standing Counsel for the Central Government waives service of Rule

for the respondents. In the facts and circumstances of the case, the matter is taken up for final disposal today.

2. What is challenged in this petition under Article 226 of the Constitution is the order dated 22.8.2003 (Annexure D) passed by the Commissioner of Central Excise (Appeals), Ahmedabad granting stay of the Order-in-Original dated 30.7.2001 (Annexure C) passed by the Deputy Commissioner of Central Excise, Division VI, Ahmedabad, subject to the condition that the petitioner shall make a pre-deposit of Rs.2 lakhs towards the penalty levied by the Deputy Commissioner in the sum of Rs.6,20,000/- under Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules").

3. Since the order under challenge is the order of conditional stay passed by the Commissioner (Appeals), we need not set out all the facts in detail but suffice it to state that the proceedings against the petitioner have arisen on account of the delay in payment of excise duty.

The show cause notice dated 1.1.2001 (Annexure "A") was issued for calling upon the petitioner to show cause as to why-

(i) interest amounting to Rs.6/- (Rupees Six only) payable on the delayed payment short paid for the month of July 2000 should not be recovered under Rule 96ZQ5(i) of the Rules; and

(ii) penalty should not be imposed upon the petitioner under Rule 96ZQ5(ii) of the Rules for not paying their central excise duty liabilities within the specified date for payment.

Another show cause notice dated 9.5.2001 (Annexure "B") was also issued calling upon the petitioner to show cause as to why-

(i) interest amounting to Rs.526/- payable on the delayed payment short paid for the month of January 2001 should not be recovered under the aforesaid provision; and

(ii) penalty should not be imposed upon the petitioner under the aforesaid Rule for not paying their central excise duty

liabilities within the specified date for payment.

The petitioner contested the show cause notices and submitted that the petitioner had given the cheques for the excise duty payable within the specified dates but it was on account of the time taken in realisation of the cheques by the department that the payments are treated as delayed payments. In any case, the petitioner had substantially paid the amounts of interest for the alleged delay in payments.

However, the Deputy Commissioner passed order dated 30.7.2001 (Annexure "C") taking the view that the payments were made beyond the specified dates and, therefore, the petitioner was liable to pay penalty of Rs.6,20,000/- in the aggregate for both the show cause notices over and above confirming the demand for interest of Rs.6050/-.

The petitioner, therefore, challenged the said order dated 30.7.2001 (Annexure C) in appeal before the Commissioner (Appeals). The petitioner also filed a stay application praying for exemption from pre-deposit. The Commissioner has passed the impugned order dated 22.8.2003 requiring the petitioner to make a pre-deposit of Rs.2 lakhs. Hence, this petition.

4. Mr BB Naik, learned counsel for the petitioner has heavily relied on the decision of this Court in Ambuja Synthetics Mills Ltd. & Anr. vs. Union of India & Ors., 2002 (50) RLT 133 and submitted that in the facts of the instant case where there was no delay or if at all there was any delay it was on account of the time taken in the clearance of the cheques, no penalty could or should have been levied when the petitioner has already paid the interest for the alleged delay.

5. On the other hand, Mr DN Patel, learned Senior Standing Counsel for the Central Government has relied on the affidavit dated 12.1.2004 of Mr Rajinder K Gupta, Assistant Commissioner, Central Excise, Division IV, Ahmedabad and submitted that penalty has been rightly levied for the delay in payment of excise duty beyond the stipulated dates and that in any view of the matter, as against the penalty of Rs.6,20,000/-, the petitioner has been required to make a pre-deposit of only Rs.2 lakhs which is less than half the amount demanded from the petitioner and, therefore, the condition imposed by the Commissioner (Appeals) is just and proper.

6. Before dealing with the rival submissions, it is necessary to give particulars of the delay for which the respondent-authorities have taken out the proceedings for imposing penalty, which are as under:-

Due Date of payment	Date of	Delay in days	Amount of duty (Rs.)
15.06.2000	16.06.2000	1	4,00,000/-
30.06.2000	01.07.2000	1	2,00,000/-
15.07.2000	18.07.2000	3	4,00,000/-
15.08.2000	17.08.2000	2	4,00,000/-
15.10.2000	20.10.2000	5	2,00,000/-
15.10.2000	21.10.2000	6	2,00,000/-
15.11.2000	23.11.2000	8	2,00,000/-
15.11.2000	25.11.2000	10	2,00,000/-
31.01.2001	02.02.2001	2	4,00,000/-

It is, thus, clear that the delay is of not more than 10 days and in most of the cases, the so-called delay is only of 1 or 2 days. The petitioner has submitted that when the cheques were handed over to the authorities within the specified dates, the time taken for realisation of the cheques cannot be said to be delay so as to warrant any imposition of penalty. Even in the other cases, the delay is only of 5 to 10 days at the maximum. It, therefore, appears to the Court that when the petitioner has already paid the interest amounts as demanded by the authorities, in fact substantial portion of the interest was already paid by the petitioner even before issuance of the show cause notices, in the facts and circumstances of the case, the appellate authority ought not to have required the petitioner to make any pre-deposit.

7. In Ambuja Synthetics Mills Ltd. & Anr. vs. Union of India & Ors., 2002 (50) RLT 133 this Court has laid down that although Rule 96ZQ(5)(ii) is not required to be struck down as invalid, the said Rule is required to be read down and the penalty stipulated in the Rule is required to be read as the maximum penalty. This Court also referred to the decision of the Apex Court in State of Madhya Pradesh vs. Bharat Heavy Electricals 1998 (99) ELT 33 laying down that the legislature could not have intended that for an accidental omission or non-furnishing of the statement for a good and valid reason must necessarily lead to the presumption that the registered dealer had the intention of facilitating the

evasion of entry tax.

This Court also referred to the decision of the Apex Court in M/s. Hindustan Steel Ltd. vs. The State of Orissa, AIR 1970 SC 253 wherein the Apex Court has made the following observations in paragraph 7 thereof:-

"7. Under the Act penalty may be imposed for failure to register a a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

7. In view of the above discussion, this petition is allowed. The Commissioner of Central Excise (Appeals) is directed to hear and decide the petitioner's appeal against the Order-in-Original dated 30.7.2001 (Annexure C) without requiring the petitioner to make any pre-deposit and the Commissioner (Appeals) shall consider the observations made by this Court in Ambuja Synthetics Mills Ltd. & Anr. vs. Union of India & Ors., 2002 (50) RLT 133.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S.SHAH, J.)

(A.M.KAPADIA, J.)

zgs/-